NO. 82-1095

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1982

R. PULLEY, Warden of the California State Prison at San Quentin,

Petitioner,

v.

ROBERT ALTON HARRIS,

Respondent.

BRIEF ON THE MERITS

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PETITION FOR CERTIORARI FILED DEC. 29, 1982
CERTIORARI GRANTED MARCH 21, 1983

QUESTIONS PRESENTED

1. Whether, in addition to the procedures whereby a trial court and jury impose a death sentence, the Federal Constitution requires any specific form of "proportionality review" by a court of statewide jurisdiction prior to the execution of a state death judgment.

2. If so, what is the constitutionally required focus, scope, and procedural structure of such a review.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit, vacating the District Court's dismissal of Harris' petition for writ of habeas corpus (Harris v. Pulley, No. 82-5246 filed Sept. 16, 1982) appears as Appendix A to the petition for certiorari.

A copy of the Ninth Circuit's order denying the petitions for rehearing and rejecting the suggestion for rehearing en banc, and modifying the original opinion appears as Appendix B to the petition for certiorari. A copy of the order of the United States District Court for the Southern District of California appears as Appendix C to the petition for certiorari.[1/]

JURISDICTION

The judgment of the United States Court of Appeals for the Ninth Circuit was filed on September 16, 1982. A timely petition for rehearing, with

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1. At the suggestion of the Clerk of this Court, at the same time as the filing of the petition for certiorari we lodged with this Court ten copies of the opinion of the California Supreme Court affirming both the conviction and the judgment of death. This opinion, on direct appeal, was filed February 11, 1981, and is reported at 28 Cal.3d 935.

suggestion for rehearing en banc, was denied November 15, 1982. The petition for certiorari was filed within 60 days of that date and was therefore timely. Certiorari was granted March 21, 1983. This Court's jurisdiction is invoked under 28 U.S.C. section 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. United States Constitution, Article I, section 9(2), Amendments Five, Eight and Fourteen.

2. California Constitution, Article I, section 17.

3. California Penal Code sections 1239, subdivision (b), 1473, subdivisions (a) and (d), 1484.

4. California Evidence Code sections 452, subdivision (d), 459, subdivision (a).

The text of Amendments Five, Eight and Fourteen of the United States California and Article I, section 17 to the California Constitution is set forth in Appendix D to the petition for certiorari. The text of the remaining constitutional and statutory provisions is set forth in Appendix A to this brief.

STATEMENT OF THE CASE

In an information filed by the District Attorney of San Diego County, California, Robert Alton Harris was charged with the kidnap, robbery, and murder of John Mayeski and Michael Baker. Harris was further charged with receiving stolen property, and being a convicted felon in possession of a concealable firearm. It was additionally alleged that Harris had served a prior prison term for voluntary manslaughter, and that he was armed with and did personally use

a firearm during the kidnap, robbery and murder of the two boys. Finally, with respect to each of the two counts of murder special circumstances were alleged which qualified Harris for the death penalty. As to each murder it was alleged that the murder was committed during the commission of a robbery. It was also alleged that each murder was committed during the commission of a kidnap for the purpose of robbery. It was also alleged as to each murder that Harris was guilty of more than one murder.

Harris' trial began November 30, 1978, and on January 23 and 24, 1979, the jury found him guilty of all counts, found to be true the allegations of a prior prison term and arming and use of firearms, found the two murders to be in the first degree, and found the special

circumstances alleged with regard to the murders to be true.

A penalty phase began January 29, 1979, and on February 8, 1979, the jury declared the penalty for each count of murder to be death. A motion for new trial was denied and a judgment of death was signed on March 6, 1979.

An automatic appeal from the judgment of death was taken to the California Supreme Court which, on February 11, 1981, affirmed the conviction and the judgment of death.

Harris pursued state habeas corpus through all three levels of California state courts, with his petition being denied by the California Supreme Court on January 13, 1982.

On March 5, 1982, (eleven days prior to his scheduled execution) Harris filed a 133 page petition for habeas

corpus in the United States District Court for the Southern District of California. Following a hearing held March 12, 1982, the District Court found Harris' contentions to be legally without merit and dismissed the petition, granting a certificate of probable cause. On that same day the United States Court of Appeals for the Ninth Circuit, in a telephonic hearing, granted a stay of execution pending an expedited appeal to that court.

Briefs were filed on an expedited schedule in the Court of Appeals and, on May 11, 1982, oral argument was held in San Francisco. On September 16, 1982, the Court of Appeals issued its opinion vacating the District Court's dismissal of Harris' petition with instructions that the writ should be granted unless the California Supreme

Court holds a "proportionality review" within 120 days of the filing of the opinion. Our petition for rehearing and suggestion for rehearing en banc were denied November 15, 1982, in an order which also modified the opinion. On November 29, 1982, a stay of the mandate was granted to December 30, 1982.

Out petition for writ of certiorari was filed December 29, 1982, and was granted March 21, 1983.

STATEMENT OF FACTS

The facts surrounding Harris' crimes are completely recounted in the California Supreme Court opinion on direct appeal. (People v. Harris (1981) 28 Cal.3d 935, 943-948.) Although these facts are not crucial to the determination of the issue presented in this petition, the following brief summary of Harris' crimes is offered to demonstrate the

context in which the issue of proportionality review is presented.

In July of 1978 appellant had been on parole for six months from a previous homicide conviction when he and his younger brother decided to rob a bank in Mira Mesa, a suburb of San Diego. Just prior to commiting the robbery Harris decided against using his own vehicle as a get-away car and, on the spur of the moment, decided to steal a car for that purpose. In the parking lot of a Jack-in-the-Box hamburger stand, across the street from the bank, he confronted John Mayeski and Michael Baker, two sixteen-year-old friends who were eating hamburgers in Mayeski's car prior to embarking on a day's fishing.

At gunpoint Harris kidnapped the two boys and drove them to a secluded area by a nearby lake where he executed

them, shooting one boy in the back and chasing the other screaming youth into the brush where he too was shot to death. Harris then returned to the first youth where he took special relish in firing a final and unnecessary bullet into that boy's head just to see what the effect would be like. Harris then ate the breakfast of hamburgers which the dead boys had left, laughing at his younger brother for not having the stomach to do the same. Using the boys' car, Harris completed the bank robbery, but was followed by customers of the bank to the home in Mira Mesa where he had been staying. He was promptly apprehended.

Harris confessed six times before trial and once again during the penalty phase. The sixth and seventh confessions were interrupted by his testimony during the guilt phase where he

denied killing the boys and blamed his younger brother for it. In the penalty phase it was also shown that while in jail awaiting trial Harris sodomized and threatened to kill a fellow inmate and was twice caught in possession of deadly weapons, first a knife, then a wire garrote. He also staged a sham suicide attempt, cutting his forearm and mixing the blood with a large amount of water to provide the necessary melodrama.

SUMMARY OF ARGUMENT

This issue arises in something of a vacuum since nowhere in the five year history of this case has anyone clearly defined what "proportionality review" is, or why it is constitutionally required. The Ninth Circuit assumes it is a comparison of each death judgment against all other capitally charged crimes in the state to avoid arbitrariness;

that it must be done by the State's highest court in every case; that it must result in a reported fact finding; and that it is required by this Court's decision in Gregg v. Georgia (1975) 428 U.S. 155, and Proffitt v. Florida (1975) 428 U.S. 242.

Such "proportionality review" is not required by Gregg or Proffitt. In Gregg this Court ruled the constitution requires the sentencing authority be given discretion which is adequately guided and fully informed. The approved Georgia statute fortuitously contained a provision for "proporitionality review." In Proffitt the Florida system was approved without such a provision although the Florida Supreme Court has assumed the power to conduct such a review when necessary. In Jurek v. Texas (1975) 428 U.S. 262 the Texas system was

approved without a hint of "proportionality review" in either the statutory or case law.

The Eighth Amendment should not be read to require such a review. This Court's primary concern over capital punishment, as expressed in Furman v. Georgia (1972) 408 U.S. 238, is that it not be applied arbitrarily and capriciously. A system crafted along the lines suggested in Gregg is presumptively free of arbitrariness and caprice. The call for "proportionality review" is based on the assumption that the presumptively valid system will fail, and a secondary back-up system is also constitutionally required. Such a special additional safeguard is unnecessary.

Federal habeas corpus, already secured by the federal Constitution, serves this purpose as it has for 200 years.

Furthermore, California provides an automatic appeal to the State Supreme Court where such issues can be addressed and also allows state habeas corpus in all three levels of California courts. This is enough. The facts of this case are particularly appalling and render any possible argument of disproportionality an absurdity.

The Federal Constitution has not been read to require the states to provide any appeal from a criminal sentence. Certainly where California has provided so much review, it should be allowed to refuse Harris an additional "proportionality review."

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ARGUMENT

I

INTRODUCTION - "PROPORTIONALITY REVIEW," THE AMORPHOUS ISSUE

Superficially, the issue presented in this case is simple and straightforward. Does the Federal Constitution require a mandatory "proportionality review" prior to the execution of any state death judgment? Throughout the almost five-year history of this case the term "proportionality review" has been used as though it were a term of art conjuring up a readily understandable and generally accepted set of principles and procedures. Nothing could be further from the truth. The singular and impressive fact is that this issue has proceeded through all available courts (some of them two and three times) and has finally been

accepted by this Court without any court or counsel developing a clearly defined picture of what "proportionality review" actually is, or offering any legal analysis of why our Federal Constitution should require such a procedure, whatever it is.

Up to and including the argument of this case before the United States Court of Appeals for the Ninth Circuit Harris has presented "proportionality review" as but one of several procedural mechanisms available to the state in creating a constitutionally adequate death penalty system. California's system has, up until now, been attacked by Harris for not having enough of these available mechanisms. As the California State Public Defender put it in his argument on this point before the Ninth Circuit, "Petitioner does not argue with

the position that no single protective device standing by itself makes the difference between constitutionality and unconstitutionality." (Brief of Amicus Curiae, p. 39; see also Brief for Appellant Before the Ninth Circuit, p. 63.)

The Ninth Circuit did not clarify the matter when it summarily concluded that the California Supreme Court had promised a "proportionality review," and that one was required under this Court's decisions in Gregg v. Georgia (1976) 428 U.S. 153, and Proffitt v. Florida (1976) 428 U.S. 242. The Ninth Circuit pointed to no language in those cases which supported its conclusion, nor did it offer any theoretical analysis why the Federal Constitution should be read to contain such a requirement. What the Ninth Circuit did do, by unexplained

judicial fiat, was to elevate "proportionality review" to the status of a constitutional sine qua non to the execution of a state death judgment.

Furthermore, neither Harris nor the Court of Appeals have taken a solid position on exactly what "proportionality review" is. In his petition for writ of habeas corpus before the California Supreme Court Harris defined "true proportionality review" as a "comparison of all cases in which the death penalty was and could have been imposed . . . ." (Petn. for Writ of Habeas Corpus, p. 119, excerpt of clerk's record before the United States Court of Appeals for the Ninth Circuit, Exh. A.) The Ninth Circuit merely referred to it as an inquiry, "whether the penalty in the case was proportionate to other sentences imposed for similar crimes." The Ninth

Circuit also opined that "proportionality review' was, "intended to prevent the arbitrary and capricious application of the penalty . . . ." (Harris v. Pulley (9th Cir. 1982) 692 F.2d 1189, 1196.)

We are thus in the anomalous posture of presenting the argument against "proportionality review" without the benefit of anyone ever having taken a solid position as to what it is and why it is required. So that we may have something to talk about we will proceed from the assumption that "proportionality review," as it is urged in this case, is a mandatory, on the record, factually oriented comparative analysis to be conducted by the state's highest court in every death penalty case. We will also assume that the scope of such a review would require that all of the factors relevant to the death judgment in each

case be compared to all of the relevant factors in every other case in the state where a jury was given the choice of life or death. The assumptive object of such an exhausting inquiry would be a determination whether the death judgment being reviewed is out of line with judgments handed down by juries in other similar cases.

Thus, the actual issue before this Court is whether fundamental American notions of justice and human dignity embodied in the Eighth and Fourteenth Amendments to the Federal Constitution require the highest court of each state to conduct what amounts to a separate "trial" following each death judgment in which that judgment would have to be compared to an ever-growing "universe," and make a factual determination which of the other cases the present one is "similar"

to, followed by a determination of whether the "similar" cases have yielded constitutionally "similar" results.

In terms of its impact on the judiciary, the proposal is staggering. (See Spinkellink v. Wainwright (5th Cir. 1978) 578 F.2d 582, 604-605, 613-614.) As we shall demonstrate, neither existing case law, nor a consideration of relevant constitutional principles requires it.

II

"PROPORTIONALITY REVIEW" IS NOT REQUIRED BY ANY EXISTING CASE LAW

The Ninth Circuit's conclusion that "proportionality review" is required was based on two unsupported and incorrect legal assumptions. First, the Court of Appeal assumed that the California Supreme Court had promised to conduct such a review in each case. Second, it assumed that this Court's decisions in Gregg v.

Georgia, supra, 428 U.S. 153, and Proffitt v. Florida, supra, 428 U.S. 242, required such a review. (Harris v. Pulley, supra, 692 F.2d 1189, 1196.) We shall address these separately.

A. California Cases Provide No Basis For the Ninth Circuit's Ruling

The Ninth Circuit's conclusion that the California Supreme Court had assumed the obligation of conducting "proportionality review' can be dealt with quickly. In both Rockwell v. Superior Court (1976) 18 Cal.3d 420, 432, and People v. Frierson (1979) 25 Cal.3d 142, 181, the California Supreme Court expressed, "Our own doubt that proportionality review was deemed essential by a majority of the justices in Gregg . . . ." In People v. Frierson, supra, and People v. Jackson (1980) 28 Cal.3d 264, 317, the California Supreme Court made reference

to its power to conduct such a review under the cruel and unusual punishment provisions of the California State Constitution. However, the court certainly did not assume a mandatory obligation to conduct any form of "proportionality review."

Thus, the California Supreme Court's declaration of its power to conduct a proportionality review under the authority of the California State Constitution simply does not support the Ninth Circuit's conclusion, and, in any event presents no federal issue. (Jones v. Estelle (5th Cir. 1980) 622 F.2d 124, 126; Sturm v. California Adult Authority (9th Cir. 1967) 395 F.2d 446, 448.)

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B. The Decisions of This Court Do Not Establish the Requirement of "Proportionality Review"

The Ninth Circuit's reliance on this Court's decisions in Gregg v. Georgia, supra, 428 U.S. 153, and Proffitt v. Florida, supra, 428 U.S. 242, are equally unavailing. In those cases, as well as Jurek v. Texas (1976) 428 U.S. 262, this Court examined and upheld the constitutionality of death penalty statutory schemes in Georgia, Florida, and Texas. In all three cases this Court concluded that the statutory scheme surrounding the imposition of the death penalty in those states insured that the sentencing authorities there would be provided with adequate information and sufficient guidance to guard against the arbitrary and capricious application of the death penalty.

However, in Gregg this Court noted that the Georgia statute has, "an additional provision designed to assure that the death penalty will not be imposed on a capriciously selected group . . . ." (Gregg v. Georgia, supra, 428 U.S. at p. 204.) This provision is the statutory "proportionality review," and every reference to it by this Court makes it apparent that it was seen as merely frosting on an already constitutional cake. Every reference to it is punctuated by the word "additional": "An important additional safeguard" (Gregg v. Georgia, supra, 428 U.S. at p. 198), "an additional provision" (Id., at p. 204), "in addition, the review function of the Supreme Court of Georgia affords additional assurance . . . ." (Id. at p. 207.)

Furthermore, in Proffitt this Court noted that the Florida statute

contained no such "proportionality review" provision. However, the statute did provide for an automatic review by the state supreme court, which court,

> "considers its function to be to '[guarantee] that the [aggravating and mitigating] reasons present in one case will reach a similar result to that reached under the similar circumstances in another case . . . . If a defendant is sentenced to die, this Court can review that case in light of the other decisions and determine whether or not the punishment is too great.' State v. Dixon 283 So.2d 1, 10 (1973)." (Proffitt v. Florida, supra, 428 U.S. at p. 271, emphasis added.)

Thus, in Florida although there is no statutory or case law requirement that a "proportionality review" be conducted in each case, the state supreme court has declared that it has the power to provide such a review in an appropriate case. It is significant to note that in deciding the Proffitt case, the

Florida Supreme Court made no mention whatsoever of "proportionality review", and there is no indication that any specific review was done at the state level in that case. (Proffitt v. State (Fla. 1975) 315 So.2d 461.)

In Jurek, the Texas statute provided for no "proportionality review" whatsoever, and there is no indication that the Texas Court of Criminal Appeals considered such a review its responsibility. Specifically, a reading of the Jurek case as it was decided by the Texas Court of Criminal Appeals reveals that no consideration whatsoever was given to any form of "proportionality review ." (Jurek v. State (Tex. 1975) 522 S.W.2d 934.) Rather, the Texas scheme was approved by this Court with no more showing than that, "by providing a prompt judicial review of the jury's decision in a court

with statewide jurisdiction, Texas has provided a means to promote the even-ended rational, and consistent imposition of death sentences under law." (Jurek v. Texas, supra, 428 U.S. at p. 276.)

It seems clear from a reading of Gregg and Proffitt that "proportionality review" as it exists in those states was not deemed by this Court to be an essential element to the constitutional validity of their death sentence schemes. This conclusion is made virtually inescapable, however, by a reading of this Court's opinion in Jurek. As this Court discussed the Texas scheme no mention whatsoever was made of "proportionality review"." It is apparent that none exists in Texas, and it is apparent from this Court's opinion in Jurek that its absence in no way lessened the constitutional validity of that state's system.

Therefore, the Ninth Circuit's summary conclusion that this Court has ordered "proportionality review" is simply unsupported. To the contrary, this Court's decisions in Proffitt and Jurek would seem to be direct authority against the requirement of such "proportionality review."

III

THE EIGHTH AMENDMENT TO THE FEDERAL CONSTITUTION SHOULD NOT BE READ TO REQUIRE THE SORT OF "PROPORTIONALITY REVIEW" ENVISIONED BY THE NINTH CIRCUIT

The real question presented in this case is not so much whether Gregg, Proffitt, and Jurek command "proportionality review" but rather whether the Eighth Amendment to the Federal Constitution should be read to compel such a review. The best way to examine this question is to look at the concerns this

Court has expressed about the constitutionality of capital punishment in its recent decisions and determine whether "proportionality review" is an indispensable necessity in meeting those concerns.

After a period of centuries marked by an assumption of the constitutional validity of capital punishment, this Court faced the issue directly in Furman v. Georgia (1972) 408 U.S. 238. In that case the nine justices of this Court expressed nine different opinions on the issue, five of which agreed that the death penalty system in Georgia at that time was unconstitutional. The opinions of Justices Brennan and Marshall were that capital punishment is under all circumstances unconstitutional. Thus, their opinions shed little light on how the states might constitutionally craft

a capital sentencing system. However, the opinions of Justices Douglas, White, and Stewart did not rule out the possibility of a constitutional death penalty. Although these three opinions expressed their concern in different ways, they all boiled down to a conviction that giving juries complete unfettered discretion in imposing the death penalty resulted in executions which were so rare and erratic as to be arbitrary and capricious, allowing for or even encouraging discrimination. Thus, the major concern evidenced in Furman is that the death penalty, if it is to be imposed, not be imposed in an arbitrary fashion, that there be some rational distinction between those who live and those who die. The clearest result of Furman was that absolute sentencing discretion was no longer constitutionally permissible.

The nine separate opinions in Furman caused some confusion among the states and, in 1976, this Court decided a new series of cases led by Gregg v. Georgia, supra, 428 U.S. 153. In Gregg and its companions this Court reaffirmed the concerns of Furman that the death penalty not be inflicted arbitrarily and capriciously. However, Gregg and its companions went a step further than Furman. Where Furman had merely decried the fact that state death penalty systems produced unconstitutionally arbitrary results, the series of cases led by Gregg revealed the constitutionally required "bones" of a valid death penalty system.

In Woodson v. North Carolina (1976) 428 U.S. 280, and Roberts v. Louisiana (1976) 428 U.S. 325, it was made clear that some discretion on the part of the sentencing authority is

constitutionally required, "to maintain a link between contemporary community values and the penal system" (Woodson v. North Carolina, supra, 428 U.S. at p. 295, quoting Witherspoon v. Illinois (1968) 291 U.S 510) and to provide the sentencing authority with an opportunity to consider the unique circumstances of each criminal and crime. (Woodson v. North Carolina, supra, at p. 304.) Thus, in Woodson and Roberts this Court concluded that mandatory capital punishment systems were constitutionally impermissible.

In the Gregg decision it was fuuther made clear that, in exercising the sentencing decision, the sentencing authority must be given, "accurate information about a defendant and the crime he committed in order to be able to impose a rational sentence . . ." and that the sentencing authority must be given,

"guidance regarding the factors about the crime and the defendant that the State, representing organized society, deems particularly relevant to the sentencing decision." (Gregg v. Georgia,, supra, 428 U.S. at pp. 190, 192.)

Thus, while Furman expressed the basic constitutional concern that the death penalty not be inflicted in an arbitrary and capricious manner, the series of cases led by Gregg established the constitutionally compelled elements necessary to safeguard against the concerns voiced in Furman. It is important to note that this Court did not rule any specific procedures to be constitutionally mandated. Rather, it was held that a system which insured informed, guided sentencing discretion would satisfy Furman's concerns.

> "In summary, the concerns expressed in Furman that the penalty of death not be imposed in an arbitrary or capricious manner can be met by a carefully drafted statute that ensures that the sentencing authority is given adequate information and guidance. As a general proposition these concerns are best met by a system that provides for a bifurcated proceeding at which the sentencing authority is apprised of the information relevant to the imposition of sentence and provided with standards to guide its use of the information." (Gregg v. Georgia, supra, 428 U.S. at p. 195.)

While the death penalty system examined by this Court in Furman was found to be presumptively arbitrary and capricious, a system set up along the guidelines revealed in Gregg can be seen as presumptively valid. (See, e.g. Spinkellink v. Wainwright, supra, 578 F.2d at pp. 605-606, 613-614.) California's death penalty system is based on the elements set out in Gregg.

It involves a bifurcated trial featuring a separate sentencing phase during which the jury is given complete and accurate sentencing information and its discretion is guided by specifically enumerated factors. (Harris v. Pulley, supra, 692 F.2d 1189, 1193.) Three times since his judgment of death Harris has asked this Court to grant certiorari based on his claim that the California statutory scheme does not satisfy the demands of Furman and Gregg. All three times this Court has refused to hear his claims. We submit that the California death penalty system meets the Gregg standards, and satisfies the concerns expressed in Furman. This system is presumptively valid. The death judgments it produces are presumptively free of arbitrariness and caprice.

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(Spinkellink v. Wainwright, supra, 578 F.2d at pp. 604-605, 613-614), cert. denied, 440 U.S. 976 (1979).)

The real thrust of the call for "proportionality review" has nothing whatsoever to do with the presumptive validity of the statutory systems by which state juries hand down death sentences. Rather, it is based in the assumption that a presumptively valid system will necessarily fail in checking arbitrariness and that a "safety net" is needed to back up the trial system. Certainly we would agree that there is always the possibility that a presumptively valid system could yield an impermissibly arbitrary result in a given case. However, this problem is hardly a new one and there is no necessity for this Court to establish a separate (much less mandatory) procedure

to safeguard against the possibility of an occasional impermissible result.

The Federal Constitution itself expressly provides such a "safety net" by securing the historical right of English speaking people to petition for a writ of habeas corpus. (U.S. Const., Art. I, § 9(2); see also Fay v. Noia (1963) 372 U.S. 391.) Federal habeas corpus has been the historic refuge of the state prisoner who claims to have been unfairly treated by an otherwise proper state system. Mr. Harris knows this well and has used federal habeas corpus to his advantage in this case. Harris filed a petition for writ of habeas corpus in the United States District Court for the Southern District of California specifically alleging that the death penalty had been arbitrarily and capriciously applied to him. (See excerpt of Clerk's record

from the U.S. District Court for the Ninth Circuit, exhibit A, pp. 5-10.) Furthermore, the Ninth Circuit even ruled in Harris' favor to the extent that it ordered the District Court to look more closely at Harris' claims that the California system discriminated against him because his victims were white (although he too is white) and because he is male. (Harris v. Pulley, supra, 692 F.2d at p. 1197-1198.)

Thus the Federal Constitution already provides a procedural safeguard against the possibility of a presumptively valid state system yielding an impermissible result. No new procedure is necessary and it would be wasteful in the extreme to require the enormously burdensome factual review envisioned by the Ninth Circuit in every death penalty case just because of the hypothetical

possibility of an occasionally disporportionate result. We submit that under the Federal Constitution the states are obliged only to devise death penalty schemes which are presumptively free of arbitrariness. The states are not constitutionally required to further back up that presumptively valid system with a complex and burdensome system of mandatory reviews.[2/]

Even if this Court were to decide that the states have some obligation to provide a review of the arbitrariness of a death sentencing decision, it is far too much to require that one as burdensome as that described by the Ninth Circuit be conducted mandatorily and on

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2. "it is established, of course, that there is no right to appellate review of a criminal sentence. McKane v. Durston, 153 U.S. 684 (1894)." (Woodson v. North Carolina, supra, 428 U.S. at p. 316 (dis. opn. of Rehnquist, J.).)

the record in every case regardless of the merits of the case.

Although we urge that the constitution does not require any such review, the California Legislature has obviously concluded that it is desireable to give criminal defendants an opportunity to appeal their convictions and raise any questions concerning the legality of their treatment. Not only has the California Legislature required that each death judgment be automatically appealed to the California Supreme Court (Cal. Pen. Code, § 1239, subd. (b)), it has also provided that criminal convictions may be reviewed in the state courts on a petition for writ of habeas corpus (Cal. Pen. Code, § 1473, subd. (a) and (d).) Harris has availed himself of both these procedures.

Whatever may have been the case in the past, this Court in both Furman and Gregg has conclusively established the death penalty cannot be imposed in an arbitrary or capricious fashion. Thus, if the California death penalty system, notwithstanding its carefully drawn safeguards, imposes a death penalty upon a defendant arbitrarily and capriciously this constitutional defect can be considered both on automatic appeal to the California Supreme Court and on a petition for writ of habeas corpus in the state courts. Any such claim can be considered by these procedures with no less efficacy than it could be on any proposed proportionality review.

On mandatory appeal to the California Supreme Court that court has access to the entire trial record, and as a further matter is statutorily empowered

to take judicial notice of the records of any other court in the state. (Cal. Evid. Code, §§ 452, subd. (d), 459, subd. (a).) Furthermore, the state habeas corpus procedure allows for a full evidentiary hearing if the judge issuing the writ is of the opinion a prima facie case has been established. (Cal. Pen. Code, § 1484.)

It is because Harris has already had so many opportunities to present any claim that the death penalty has been imposed arbitrarily or discriminatorily as to him, that we have repeatedly said that he has had whatever "proportionality review" may be deemed necessary. The fact that the California Supreme Court summarily denied his petition for writ of habeas corpus on this ground is not proof that he has been denied review, rather it

indicates that there was not enough substance to his claim to warrant a fuller factual hearing.

As can be seen, this Court is not actually called upon to rule whether the constitution requires state appellate review of the sentencing decision, since California has provided amply opportunities for death sentence defendants to raise these issues. The actual issue in this case is whether, in addition to an automatic appeal to the California Supreme Court and the availability of the habeas corpus at three levels of California courts (not to mention habeas corpus in the federal courts), every death sentenced defendant has a constitutional right to a complete separate factual determination by the state's highest court on the issue of whether his judgment is arbitrary or

capricious, irrespective of his ability to make a prima facie showing that it is.

The federal constitution does not require such wastefulness. It proscribes arbitrary infliction of the death penalty and, therefore, reguires guided informed sentencing direction. California provides that and much more. We do not come into this Court championing arbitrary death judgments, nor do we urge that a hypothetically arbitrary judgment should be immune from state appellate review. With respect to the procedural safeguards built into the death penalty process we are simply urging, in common lay terms, that enough is enough. Most specifically we urge that it is unnecessary to force the state judiciary to conduct the sort of mandatory "proportionality review" envisioned by the Ninth Circuit in every case regardless of the merits of that case.

In fact we urge that the facts of the present case illustrate our point eloquently. Mr. Harris was only six months out on parole from a previous homicide conviction when he kidnapped two teenage boys to use their car in a bank robbery. He then coldbloodedly executed them so that they could not be witnesses against him, shooting one youth in the back and chasing the other screaming youth into the underbrush where he too was executed. Mr. Harris then sat down and ate the boys' unfinished hamburgers, laughing at his younger brother for not being able to do the same. While in jail awaiting trial Harris threatened and sodomized a fellow inmate and was twice caught making deadly weapons. He confessed several times to the murders.

Now Robert Harris claims that he was sentenced to death not because of

his deeds, but because his victims were white (though he too is white) and because he is male. Robert Harris will ask this Court to rule that the United States Constitution demands that the California Supreme Court compare his case to all other "similar" cases (if indeed any other similar cases can be found) and make an on-the-record factual determination whether the death penalty is disproportionate as applied to him.

We submit that there is simply no credible argument that the death penalty is disproportionate as to Robert Harris, and that if the facts of his case do not justify the death penalty, no case will. These facts demonstrate the wisdom of allowing the state courts to refuse defendants such as Mr. Harris a full blown evidentiary hearing on such patently absurd claims.

Robert Harris has been tried, convicted, and condemned under a presumptively valid capital punishment system. He had an automatic appeal to the California Supreme Court which exhaustively considered all his claims. He has pursued two separate writs of habeas corpus, each one through all three levels of the California state courts. He pursued federal habeas corpus in the federal district court and enjoyed a full and complete appeal from the denial of that petition. He has on three separate occasions petitioned to this Court for certiorari. Robert Harris has pressed his claims on 13 separate occasions in 6 separate courts for a period of almost five years. He asks for yet another hearing. His case typifies the longevity and redundancy of capital litigation. We

submit that Mr. Harris has had all the process he is due.

* * * * *

Without the benefit of having before us a coherent argument why the constitution should require a proportionality review, or even a clear statement as to what such a review is, we have attempted to demonstrate that California's death penalty system is presumptively fair, and provides more than ample opportunity for appellate review of any issue which might arise. We think it is demonstrated that a "proportionality review" as envisoned by the Ninth Circuit is not necessary to meet the concerns expressed by this Court in Furman v. Georgia, supra 408 U.S. 238. To the contrary, if we are to give full consideration to the question, "proportionality review" is better

suited to obstruct the fair and appropriate implementation of the death penalty than it is to ensure it.

The question of the wisdom of capital punishment is one that gives rise to strongly held feelings and commitments on both sides. Through the decisions of this Court in Gregg and its companion cases, the abstract constitutionality of the death penalty is secure, and it is now the law of the land in the overwhelming majority of the states. This fact, however, does not make it any more warmly accepted by its detractors. It can be expected that strongly held feelings against the death penalty will encourage some to argue in favor of onerous procedural requirements at least in part in an effort to make the implementation of the death penalty so crushingly expensive and burdensome a state will be

disuaded from using it in appropriate cases and perhaps may abandon it altogether.

One leading opponent to the death penalty, who has argued several such cases before this Court, gave the following advice to defense attorneys in capital cases:

> ". . . prosecutors and courts have got to be made to pay the price for prosecuting cases capitally. If life is going to be taken, if a prosecution is going to be undertaken which threatens somebody's client with death, the defense has to make it very, very clear that it is not going to be easy, that there's going to be no accomodation, that every issue that can be fought will be fought to the end - that there is no such thing as a line of least resistance or a line of slight cost when it comes to prosecuting death cases. Before a prosecutor decides to paper a case as a

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> death case, he damn well better make up his mind in this post-Jarvis/Gann era that it's worth it."[3]

We would submit that this is not the proper approach to use in deciding what procedures are required in capital cases. Capital punishment is now the constitutionally permitted law of the land. It is important for the courts in deciding issues such as the present one, to approach these questions not with grudging resignation, but with a sense of cooperation with the American people from whom the courts derive their power, and whose deeply felt needs and desires are expressed overwhelmingly in the popular national support for capital punishment.

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3. Interview with Anthony Amsterdam in California Attorneys for Criminal Justice, Forum, Sept./Oct. 1978, p. 60.

Although Americans have always nourished a certain distaste for the slowness and expense with which their government moves, recent years have witnessed a particular heightening and sharpening of that distrust and resentment as they have repeatedly tried to protect themselves from violent crime through the passage of capital punishment laws.

It is imperative in cases such as the present one that we avoid any temptation to make the State "pay the price" as a way to discourage its implementation of a proper punishment.

This nation has spent a decade in debate, carefully examining our fundamental national commitment to the death penalty. The debate has been healthy, and has renewed our national sense of purpose and direction. The debate is over. It is time to get on with it.

CONCLUSION

For the foregoing reasons petitioner respectfully requests that the judgment of the United States Court of Appeals for the Ninth Circuit be reversed.

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State of California

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STEVEN V. ADLER,
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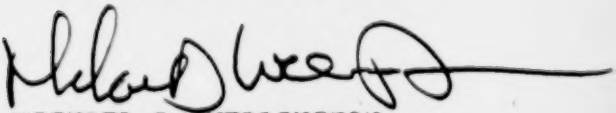

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Appendix A

UNITED STATES CONSTITUTION

Section 9.

2. The privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it.

CALIFORNIA STATUTES

Evidence Code

§ 452

Judicial notice may be taken of the following matters to the extent that they are not embraced within Section 451:

. . . . . .

(d) Records of (1) any court of this state or (2) any court of record of the United States or of any state of the United States.

§ 459

(a) The reviewing court shall take judicial notice of (1) each matter properly noticed by the trial court and (2) each matter that the trial court was required to notice under Section 451 or 453. The reviewing court may take judicial notice of any matter specified in Section 452. The reviewing court may take judicial notice of a matter in a

tenor different from that noticed by the trial court.

Penal Code

§ 1239

Text of section operative until January 1, 1989.

. . . . . .

(b) When upon any plea a judgment of death is rendered, an appeal is automatically taken by the defendant without any action by him or his counsel. The defendant's trial counsel, whether retained by the defendant or court-appointed, shall continue to represent the defendant until completing the additional duties set forth in paragraph (1) of subdivision (b) of Section 1240.1.

§ 1473

(a) Every person unlawfully imprisoned or restrained of his liberty, under any pretense whatever, may prosecute a writ of habeas corpus, to inquire

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into the cause of such imprisonment or restraint.

. . . . . .

(d) Nothing in this section shall be construed as limiting the grounds for which a writ of habeas corpus may be prosecuted or as precluding the use of any other remedies.

§ 1484

Proceedings on the hearing.

The party brought before the Court or Judge, on the return of the writ, may deny or controvert any of the material facts or matters set forth in the return, or except to the sufficiency thereof, or allege any fact to show either that his imprisonment or detention is unlawful, or that he is entitled to his discharge. The Court or Judge must thereupon proceed in a summary way to hear such proof as may be produced against such imprisonment

or detention, or in favor of the same, and to dispose of such party as the justice of the case may require, and have full power and authority to require and compel the attendance of witnesses, by process of subpoena and attachment, and to do and perform all other acts and things necessary to a full and fair hearing and determination of the case.

AFFIDAVIT OF SERVICE BY MAIL

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No. 82-1095

R. PULLEY,
Petitioner,
v.

ROBERT ALTON HARRIS,
Respondent.

I, the undersigned, say: I am a citizen of the United States, over 18 years of age, employed in the County of San Diego, in which county the within-mentioned mailing occurred, and not a party to the subject cause; my business address is 110 West A Street, San Diego, California 92101.

I served the within BRIEF ON THE MERITS: an original and 39 copies on the United States Supreme Court as follows: Alexander L. Stevas, Clerk, United States Supreme Court, Washington, D.C. 20543, of which a true and correct copy of the document filed in the cause is affixed, by placing three copies thereof in a separate envelope for each addressee named hereafter, addressed to each such addressee respectively as follows:

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TO BE DELIVERED TO
JUDGE ELI H. LEVENSON

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JUDGE ENRIGHT

U.S. Court of Appeals
Ninth Circuit
7th and Mission Streets
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Each envelope was then sealed and with the postage prepaid deposited in the United States Mail by me at San Diego, California, on the 19 day of May 1983.

There is a delivery service by United States Mail at each place so addressed or regular communication by United States Mail between the place of mailing and each place so addressed.

I declare under penalty of perjury that the foregoing is true and correct.

Dated at San Diego, California, May 19, 1983.

CLIFFORD E. REED, JR.

Subscribed and sworn to before me
this 19th day of May, 1983.

Notary Public in and for said County and State

KAREN E. LUM
NOTARY PUBLIC — CALIFORNIA